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MICHAEL RODAK, JR.

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-340

WILLIAM E. MALONE,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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William E. Malone, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Claims entered in this case on June 28, 1974.

OPINION BELOW

The opinion of the Court of Claims and its opinion on rehearing are not reported but are included in the Appendix.

JURISDICTION

The judgment of the Court of Claims was entered May 17, 1974. A petition for rehearing was subsequently denied on June 28, 1974. The jurisdiction of this Court is invoked

under 28 U S.C. 1254 (1) and this Court's superintending powers over lower federal courts.

QUESTIONS PRESENTED

1. Whether or not by dismissing this action the Petitioner has been denied the essential rights of fairness, due process, and equal protection of law.

2. Whether or not it is an act of injustice to the Petitioner, to refuse to toll the statute of limitations when he has in diligence and good faith pursued his cause of action.

3. Whether or not the Court of Claims should be required to toll the statute of limitations by their own rules of procedure.

4. Whether or not the position taken by the Respondent in the previous action is in opposition to the foundation of American Justice.

5. Whether or not after such a long period of diligently searching for relief it is within the American idea of Fairness, Justice and Due Process, to deprive the Petitioner of any remedy.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

The Constitutional Provisions involved are due process, equal protection of law, fairness and justice. The Fifth Amendment and Fourteenth Amendment of the Constitution, the Preamble of our Constitution, and the Rules of the U. S. Court of Claims numbered 68, 69, 32 (b) are the different statutes and guarantees in question.

STATEMENT

The Petitioner is a citizen of the United States of America and residing in Oklahoma City, Oklahoma, and has been a resident of the same city and state since his separation from the United States Army.

The Petitioner began in the service of his country on October 14, 1943, and was on active duty in the U. S. Navy until April 4, 1946. On September 13, 1952, he re-enlisted in the U. S. Army and would have served until November of 1967 or to within two years of 20 years service as computed under 10 U.S.C. 3927.

In October, 1966, the Petitioner received a letter from the Adjutant General, E. J. Neumann, to inform him that a Promotion Board had recently met and considered him for promotion from the rank of Captain to Major. Since the Board felt that he was qualified but not best qualified for the promotion, he was denied such and was placed on a deferred status.

A second Promotion Board met in March of 1967, and again considered the Petitioner for promotion to grade of Major. Upon reviewing his records, they, like the first board, felt that although he was qualified, he was not best qualified for the rank of Major.

A letter was sent to the Petitioner on May 4, 1967, informing him of the denial of his promotion and to inform him of the statute (10 U.S.C. 3303d) which requires that a deferred officer be discharged if he is passed over the second time by a Promotion Board. According to the statute, he must be discharged no later than the first day of the

seventh month following the Secretary of the Army's approval of the Board's action. In this situation that would be after November 1, 1967.

After this letter of May 4, 1967, the Army found that the March, 1967 Promotion Board was lacking a material report in its file on Captain William E. Malone. This was an efficiency report for November 3, 1965 to February 2, 1966. So, another board in June, 1967, considered the Petitioner for promotion to the grade of Major, and equipped with the complete file, they again found the Petitioner was qualified but not best qualified. On August 30, 1967, the Petitioner received a letter which informed him of this outcome, reinstated the recommendation in the letter of May 4, 1974 and stated that such letter was still valid.

The Petitioner then complained because he felt that since the March, 1967 Board did not fully consider his qualifications because of a missing efficiency report that their finding was void as should be their recommendation of discharge no later than November 1, 1967. It is our contention that the discharge time should have been calculated from the Secretary's approval of the June, 1967 Board recommendations.

If the time had been correctly calculated from June, 1967, the discharge time would have been later than November 1, 1967 which would have allowed the Petitioner to have had eighteen (18) years of active military duty. According to 10 U.S.C. 3913 (b):

> ". . . a deferred officer who is not recommended for promotion under section 3303 (c) . . . [who] is within two years of becoming entitled to retirement under

> subsection (a) or some other provision of law, shall be retained on the active list in his regular grade until the date he completes his 20 years of service . . ."

the Army was bound to keep the Petitioner on active duty until he completed his 20 years and became eligible to draw his retirement pay. The Petitioner contends that he was wrongfully discharged from the U. S. Army and that he should have been reinstated to active duty at the rank of captain and been allowed to serve his final two years entitling him to full retirement.

For several years following his discharge from the Army, the Petitioner sought a review of his case by the Army. Everytime he made such a request, he was rejected by the Army. After many fruitless attempts at rehearing, he then appealed to the Legislative Branch of government for assistance. After several letters to the Congressmen from Oklahoma, seeking assistance, and receiving no relief from them, he decided to try the Judicial Branch.

Upon obtaining this attorney, a suit was filed in the Federal District Court for the Western District of Oklahoma on April 6, 1973 (case number CIV-73-231-D). The Defendants in the suit were the United States of America, the Secretary of the Army and the United States Army.

The basis of that suit was identical to this one. A copy of the complaint is on file with the Court of Claims. There is no dispute about that suit having been timely filed.

On June 8, 1973, the United States of America through William R. Burkett, United States Attorney, filed a Motion

and Order *(ex parte)* extending his answer time sixty (60) days.

The reason for the extension was that the administrative records needed to prepare the answer had not yet arrived from Washington, D. C.

On August 6, 1973, the United States of America requested an additional thirty (30) days to answer. The reason for the extension being that a fire at the record center in St. Louis, Missouri, had further delayed receipt of the necessary military records. This, too, was granted *ex parte.*

On September 3, 1973, William R. Burkett once again asked for an Extension of Time in which to file his answer. The motion asked for an additional 10 days. The reason once again was that the necessary records had not yet arrived. The Court again granted his extension *ex parte.*

After all of these delays ostensibly to receive records which would assist in answering Plaintiff's complaint, the United States filed an alternative Motion to Dismiss and Summary Judgment. The gist of the motions was that the Court of Claims has exclusive jurisdiction over matters of this nature. The "necessary" documents so long in coming had nothing to do with the jurisdiction of the Court of Claims.

In an attempt to expedite the Federal Court system and alleviate the decision making burden, the Petitioner in pursuance of Rule 41 F.R.C.P., 28 U.S.C., moved for, and was granted a voluntary dismissal without prejudice of the case in the Federal District Court for the Western District

of Oklahoma. The purpose of this dismissal was to enable the Petitioner to refile the suit in the U. S. Court of Claims.

In mid-November, 1973, Counsel for the Petitioner attempted to file suit with the Court of Claims. Unfortunately, the Petitioner's Counsel being unfamiliar with the Court's rules, forwarded a Petition to the Court of Claims on legal size paper. The said Petition was rejected by the Court of Claims for several technical reasons. The Petition was also rejected because the Petitioner's Counsel had not been admitted to practice before the Court of Claims.

The Clerk of the Court of Claims sent the Petition back to Petitioner's Counsel with instructions on the proper size of paper. He accompanied this with the application for admission to practice before the Court of Claims. In December of 1973, the Petitioner's Counsel was admitted, and immediately refiled the Petition on the proper size paper, and with several exhibits attached thereto and expressly incorporated within it.

On February 13, 1974, the Respondent here, filed a Motion to Dismiss based upon the grounds that the suit was barred by the statute of limitation. The Court on May 17, 1974, granted a dismissal. The Petitioner filed a Petition for Rehearing upon the grounds that to dismiss this suit would be to violate the due process clause, and deprive the Petitioner of basic fairness as guaranteed by our Constitution.

On June 7, 1974, the Respondents filed a Response to the Petition for Rehearing. The basis of this was that the Petitioner had not followed the rules of the Court of Claims to the letter and secondly that the filing in the Federal Dis-

trict Court was immaterial. They also changed their position and claimed some time in early August as the date the statutes ran. The Court of Claims in its June 28, 1974 order denied the Motion for Rehearing and reasserted the previous order. This order was based upon Defendant's newly asserted date for the running of the statute.

The Petitioner, William E. Malone, now asks the Honorable Supreme Court to reconsider the decision and order of the Court of Claims on the basis of due process, fairness, and justice.

REASONS FOR GRANTING CERTIORARI

REASON I

BY DISMISSING THIS SUIT THE PETITIONER HAS BEEN DENIED THE FUNDAMENTAL FAIRNESS, DUE PROCESS AND EQUAL PROTECTION OF LAW AS GUARANTEED BY THE UNITED STATES CONSTITUTION AS ENUMERATED IN THE BILL OF RIGHTS.

As this Court well knows, the basic principle and purpose of our Constitution is as follows:

> "WE THE PEOPLE of the United States, in order to form a more perfect Union, establish Justice, . . . promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America."

Due Process

From this preamble through the body of the Constitution, down to the very last Amendment, the themes of Justice and Liberty are present. The concept of due process

is an element of these two broad categories and as such is guaranteed to every citizen in the Fifth and Fourteenth Amendments. The Fifth Amendment provides that:

> ". . . nor be deprived of life, liberty or property without due process of law; . . ."

The Fourteenth Amendment is an enforcement on the States and provides as follows:

> ". . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

It is also mentioned or inferred in several other provisions throughout the Constitution.

The Courts of this land have been confronted numerous times with the project of assigning a specific definition to the concept of "due process." As of yet, no Court has been able to lay down an iron-clad provision for such a situation. As one writer puts it:

> "Substantive due process may be roughly defined as the constitutional guaranty that no person shall be deprived of his life, liberty, or property for arbitrary reasons" (Robert T. Kimbrough).

As is seen he described the above as a rough definition.

In the case of *United States ex rel. Montgomery* v. *Ragen*, 86 F.Supp. 382 (1949), in the Northern District Court of Illinois, "due process" was wrestled with. In this situation, it dealt with habeas corpus question of whether the evidence in the case was sufficient to convict the Pe-

titioner of rape and sentence him to imprisonment. In dealing with the matter the fundamental rights of the Petitioner came into the picture and Judge Igoe said this of "due process":

> "Due process clause embraces requirements that no trial shall deprive a Defendant of the constitutional safeguards which are of fundamental importance and a necessary part of a fair trial."

And as to a concise meaning of due process, it was said:

> " 'Due process of law' means fair play and is that process of impartial law which is binding because it is right."

The above statement is perhaps the best way to describe due process, "fair play." This of course is one of the basic corner stones of American Democracy, Fairness.

To apply this ideal of "due process" or Fairness to this situation, we must rely on the Fifth Amendment. Our position simply stated is: "Is it fair to allow this Petitioner to be denied his free access to the Courts of this country, because of governmental delay, and because of the clerk's failure to file this case when tendered to the Court of Claims for filing?" The Petitioner now asserts that such is not fair and as such defeats the whole ideal of American Justice.

To carry this further, see *Armstrong* v. *Manzo*, 380 U.S. 545, 85 S.Ct. 1187 (1965). This case deals with the idea of procedural due process. It also states in its conclusion through Mr. Justice Stewart that:

> "Fundamental requirement of due process is the opportunity which must be granted at a meaningful time in a meaningful manner."

This same basic ideal is voiced in *Truax* v. *Corrigan, et al.*, 257 U.S. 312, 42 S.Ct. 124 (1921), where Chief Justice Taft in delivering the opinion of the Court stated:

> "Due process of law requires that every man shall have the protection of his day in court and benefit of the general law, which hears before it condemns, and proceeds not arbitrarily, but upon inquiry, and renders a judgment only after trial."

In the case at bar the Petitioner is going to be deprived of his fundamental right of his day in court. He was delayed, not for a few months, but a few years by the Army while pursuing his remedy within the structure of the Army. He made an appeal to the members of the legislative branch as well as the executive branch for assistance. Each and every avenue he pursued was blocked in some way. Finally after a number of years of unrewarded appeals to the other two branches of government, the Petitioner resorted to the Judicial Branch.

The suit filed in Oklahoma Federal Court was unreasonably delayed as the government rolled the statute of limitations up in red tape.

The red tape continued into the Court of Claims.

Although filing was timely made, the Court of Claims denied it for two reasons (1) the Petition was on the *wrong size paper* and (2) no one from his firm was admitted to the Court of Claims. By the time his attorney was admitted

to practice and had refiled the Petition, the Statute of Limitation had become a bar upon this proceeding.

The Court of Claims was placed on notice of the suit when the initial brief was sent to the Clerk to be filed. The suit was clearly presented to the Court within the statutory period of time, but because of irrelevant technicalities, it was not filed. Is it proper and within the framework of American Justice to allow an injustice so that some technicalities, in regard to paper size, might be carried out?

This arbitrary and oppressive ruling concerning the statute of limitations must be overturned and Petitioner afforded his day in court.

According to numerous cases there is a settled rule regarding the act of putting the Court on notice and the presumption of filing such. In the case of *Charlson Realty Co. v. United States,* 384 F.2d 434 (1967), which is cited in Defendant's Brief in Opposition to our Petition for Rehearing, it is stated that:

> "It is a well established rule of law that a petition is considered filed when it is delivered to the Court." (Citing numerous authorities.)

This case holds that when the Court receives the Petition or when it is placed on actual notice of the suit by the receipt of the Petition, it is presumed to be filed.

Another case more closely related to our situation here, *Parrissi v. Telechron Inc., and General Electric Co.,* 349 U.S. 46, 75 S.Ct. 577 (1955). In that case the Petitioner had thirty (30) days to file a notice that he was going to

appeal and he did so. But upon receiving such notice, the Clerk refused to file it because the Petitioner had overlooked the payment of a $5.00 filing fee. By the time the Petitioner could forward such payment to the Court, his thirty (30) day filing period had passed and therefore, the notice of appeal was technically untimely. The Supreme Court took the case on certiorari. The granting of certiorari emphasizes the importance of this issue in Constitutional terms.

The Supreme Court's opinion announced that the Clerk's receipt of the notice of appeal was sufficient to satisfy the filing requirement.

In the case at bar the Plaintiff presented his petition to this Court within the statutory time. The facts surrounding that presentment having been repeatedly alluded to will not be covered again herein.

In comparing these two cases it is seen that both were delayed in filing beyond the permissible time, because of some technicality totally immaterial to the issues for trial on the merits; and as a result both were dismissed because they were filed out of time; both were presented to the Court Clerk within time but were not allowed to be filed. But in *Parrissi, supra,* the United States Supreme Court held that to present such notice to the Clerk was sufficient and by analogy this principle should be applied to this cause. See: *Bolduc* v. *United States,* 19 F.Supp. 740, and *Schultz* v. *United States,* 132 F.Supp. 953. ("Filing" . . . invariably involves delivery to and receipt by a proper official.)

Equal Protection

By enforcement of this dismissal the Plaintiff will also be denied the Constitutional right of "equal protection of law." Although it is not expressed in the Fifth Amendment, the Court has said that by its very nature it is a part thereof. In the case of *Bolling, et al.* v. *Sharpe, et al.*, 347 U.S. 497, 74 S.Ct. 693 (1954), the Supreme Court discusses this problem. This case is one of the cases which was linked with *Brown* v. *Board of Education*, 347 U.S. 483, 74 S.Ct. 686. In this case, Mr. Chief Justice Warren wrote as follows:

> "The concepts of equal protection of laws and due process both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of laws is more explicit of safeguards of prohibited unfairness than due process of law . . ."

The Chief Justice continues with remarks on the argument that there is no express clause pertaining to equal protection in the Fifth Amendment, while the Fourteenth Amendment does contain such. He says that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." This is to say that both divisions of government are under a duty to provide every citizen with "equal protection of law." This idea is stated and concluded from cases too numerous to cite. (*Currin* v. *Wallace*, 306 U.S. 1, 59 S.Ct. 379).

But what is meant by "equal protection of law." This, like due process, has been a continual question to our courts and there has been no iron-clad rule or definition laid

down. This problem of a definition is dealt with in many cases, too numerous to mention. In *Truax* v. *Corrigan, et al.*, 257 U.S. 312, 42 S.Ct. 124, the Supreme Court through Mr. Chief Justice Taft said this, of equal protection:

> ". . . no class or person shall be denied the same protection of laws which is enjoyed by other persons or other classes in like circumstances, [in their lives, liberty, property and in their pursuit of happiness.]"

So as can be inferred from this, equal protection of law can be explained with the phrase of "equal justice for all."

In the case at bar, the equal protection of law is denied Plaintiff because he has been denied all protection of law, and has been placed at the mercy of the Court of Claims and the Promotion Board of the U. S. Army. This Supreme Court should not allow such to occur. The Petitioner has been denied the privileges of his job, such as salary and retirement benefits, without allowing him to present his side of the case. He has been denied his day in court and because of this denial he has been unable to air his complaints and as a result has been discriminated against. Therefore, he has been denied the "equal protection of law."

Strict enforcement of the Court of Claims rules will deprive the Petitioner of "equal protection of law." For if he is not allowed to express himself on this matter, the Court, in effect, will be allowing an administrative board to decide his future without ever having heard one word from Petitioner.

In summary, there are certain fundamental rights guaranted to every American citizen. If this Honorable

Court continues with this dismissal, the Petitioner will be deprived of his fundamental right as contained in the Fifth Amendment. The delays which are present in the case are of no fault of the Petitioner and he should not be denied his day in court because of problems caused by the very Defendant who would seek now to claim the benefits.

The Petitioner now prays this Honorable Supreme Court in the exercise of Fairness and Justice, allow the Petitioner his day in Court and the protection of the Fifth Amendment, by providing for a rehearing of this matter for consideration.

REASON II

SINCE THE PETITIONER HAD DILIGENTLY AND IN GOOD FAITH PURSUED HIS CAUSE OF ACTION AND REMEDY, THE STATUTE OF LIMITATIONS SHOULD HAVE BEEN TOLLED UPON FILING IN THE FEDERAL DISTRICT COURT.

As has been previously discussed the Petitioner was diligent in trying to find a remedy. He in good faith pursued several different avenues within the structure of the Army but no remedy was forthcoming. He also pursued, in good faith, his cause of action in Federal District Court where the government stayed behind a log for a period of some three months before insisting there was no jurisdiction inherent to that court. The delay of three (3) months was of course caused by the United States' Attorney. These extensions brought the Plaintiff's cause frightfully close to the end of the limitation period. As is obviously seen this delay was not caused by any action or omission on the part of the Petitioner herein, but, instead, was wholly caused

and asked for by the United States of America (Defendant below).

The filing of the suit in Federal District Court for the Western District of Oklahoma was inadvertent. The Petitioner's Attorney, in good faith, filed the suit in the District Court, and after a delay of some one hundred (100) days, he was informed that such cause should have been filed in the United States Court of Claims. Upon learning of such, the Petitioner's Attorney promptly and timely issued a petition to be filed with that Honorable Court of Claims. The Court denied it because of legal size rather than letter size paper and because this Attorney was not admitted to practice before it. Upon receiving such information the Attorney again promptly sought to be admitted to practice before this Honorable Court. After the passage of some thirty (30) days, the Certificate of Admission was received. Once more the Petition was sent to this Court and was properly filed. Subsequently, this action was dismissed on Defendant's motion because it was barred by the Statute of Limitations.

As is obviously seen, the Petitioner has not neglected his cause of action, but has vigorously pursued it. By filing in the Federal District Court the action was commenced, even though in the wrong court. There are many jurisdictions which would consider that the Statute is tolled, even though it was filed in the wrong court. *Smith* v. *McNeal*, 109 U.S. 426; *Little Rock M.R. & T.R. Co.* v. *Maneese*, 4 S.W. 778 (Ark.); *Roth* v. *Northern Assur. Co.*, 203 N.E.2d 415 (Ill.); *Sachs* v. *Ohio National Life Ins. Co.*, 131 F.2d 134 (Ohio); *Loomer* v. *Dionne*, 155 N.E.2d 411 (Mass.);

Wente v. *Shaver*, 169 S.W.2d 947 (Mo.); *Gaines* v. *City of New York*, 109 N.E. 594 (N.Y.); *Wasyk* v. *Trent*, 191 N.E.2d 58 (Ohio); *Leno* v. *Meunier*, 209 A.2d 485 (Vermont). Some of these cases are based on statutes which allow such refiling and in this regard it seems quite obvious that such a right to refile is considered to be fundamental and basic. Enacting a statutory provision regarding such a privilege, illustrates the emphasis placed on such a right, where it has been originally filed in a court without jurisdiction. The additional element that the initial filing must be done in good faith was satisfied here. This cause was filed in District Court and an attempt was made to file in the Court of Claims. The action was commenced by filing in District Court; although it was without jurisdiction, the action was still filed, and as such the action was commenced. Also by attempting to file this action in the Court of Claims, that Court was placed on notice of such case.

There are also cases which hold that by voluntarily dismissing without prejudice, the time will be extended within which to file a subsequent action. In the action at bar, such a dismissal was effected by the Petitioner in the District Court for the Western District of Oklahoma. The cases are *Harrison* v. *Remington Paper Co.*, 140 Fed. 385 (Kan.); *Anderson* v. *Asphalt Distribution Co.*, 55 S.W.2d 688 (Mo.); *Hooper* v. *Atlanta, K & N Ry. Co.*, 60 S.W. 607 (Tenn.); and numerous others.

It is not reasonable that the states are to be more concerned with fundamental constitutional rights than is the Federal Government. To allow such a complete dismissal here would provide for the Petitioner a complete loss of remedy on the merits because of a mere procedural defect.

REASON III

ACCORDING TO THE VARIOUS RULES OF THE COURT OF CLAIMS, THE PETITIONER SHOULD HAVE BEEN GIVEN A REHEARING.

The Rules of the Honorable Court of Claims allow for rehearing upon a Dismissal such as here.

Under Rule 68, 28 U.S.C.A. (Court of Claims), it is stated that:

> "A rehearing may be granted, a judgment may be altered, or amended, or a new trial may be granted on any grounds established by the rules of common law or equity applicable between private parties."

To follow this up, this same course is continued in Rule 69, 28 U.S.C.A. (Court of Claims), to say:

> ". . . the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect . . . [and] such motion shall be made within a reasonable time."

These two rules seem to say that the Court of Claims will permit a rehearing upon a proper equitable or common law basis or upon the grounds of mistake, inadvertence, surprise or excusable neglect. The meaning of such rule would allow the Plaintiff to go back into that Court for rehearing. The reason for the dismissal is the Statute of Limitations bars the claim.

The Court of Claims, as is quite obviously seen, is not only interested in carrying out the Statute of Limitations, but is primarily interested in the dispensing of Justice and

Fairness to all who upon a good faith belief make a mistake or exercise excusable mistake.

Rule 32(b), 28 U.S.C.A. (Court of Claims), is also applicable to this case. This section states as follows:

> "All pleadings shall be so construed as to do substantial justice."

Once more it is seen that the Court of Claims is interested in the proper performance of justice. To allow substantial justice through the pleadings would in this instance mean the granting of rehearing. Rule 68 states that the Court of Claims will abide by all equitable principles; particularly applicable here is the maxim: "Equity will aid the diligent."

The Plaintiff has been diligent in his pursuit of his remedy. So to apply Rule 68 and Rule 69 of the Court of Claims, this Honorable Supreme Court should grant the Petitioner a hearing in the Court of Claims.

REASON IV

THE POSITION OF THE DEFENDANT AND THE RULING OF THE COURT OF CLAIMS ARE SPECULATIVE AND UNTENABLE.

The Defendant cited two reasons why the case should not be reheard in the Court of Claims: "(1) The Court should not consider matters pleaded in violation of its rules; and (2) The filing of suit in District Court is irrelevant." These two are inserted in the Defendant's Opposition to Petition for Rehearing, filed June 7, 1974, in the Court of Claims.

To look back to the Rules of the Court of Claims, under Rule 32(b), 28 U.S.C.A., it is stated that:

> "All pleadings shall be so construed as to do substantial justice."

Obviously under this Rule it can be logically presumed that no rule of pleading should be so enforced so as to deny substantial justice. To construe the Rules as strictly as the Defendant asserts, would be violative of Rule 32(b), 28 U.S.C.A. (Court of Claims), which places a limitation on all other rules in regard to pleadings.

As to the Defendant's second reason, that the filing in District Court is irrelevant, we once more reiterate previously cited cases. In the cases cited in Reason II, it was shown that in several jurisdictions, allowances are made where the filing is either done in the wrong court or was voluntarily dismissed. Many of these jurisdictions have statutes which allow for an additional amount of time to correct their mistakes. These jurisdictions, and several others, feel that this consideration is so fundamental that statutes have been written to allow provisions for such mistakes. The Federal Government should not be accountable for less than a State Court is.

The Defendant cited the case of *Charlson Realty Co. v. United States, supra*, to substantiate his second reason for dismissing this cause (cited earlier to substantiate a point made by the Petitioner, that is that "filing is presumed when delivered to the Court"). The Defendant used the case to show that the filing in District Court is irrelevant here, but we assert that it was not on point for his purposes because it dealt with an administrative hear-

ing before the District Director of the Internal Revenue, rather than a hearing before a Court of Law.

The filing of the cause is relevant to show that Petitioner has conscientiously and diligently pursued his cause in good faith. The manner in which the Plaintiff has pursued his cause is important and a relevant factor of consideration. Courts should cover every factor which might have a bearing on the reason for a prolonged delay. This was definitely relevant to this consideration and such evidence should be admitted.

Also in the Defendant's second reason for dismissal, he mentions that the "actual separation date" of the Petitioner from the Army, was August 18, 1967, and that any suit filed after August 18, 1973, would be untimely. He further states that, therefore, it is not necessary to consider the Petitioner's tender of a petition in November, 1973. The view in this Motion is contrary to the Motion to Dismiss filed by Defendant on February 13, 1974. In that document the Defendant concluded "it is clear that the separation occurred on or before November of 1967." The Defendant goes on to assert that this claim would become stale six years from the November, 1967 date. He makes no mention of August, 1967, in his Motion to Dismiss. The Defendant sets up November, 1967, as the date of consideration in one pleading and then without explanation restates his position in terms of August, 1967. It is quite clear that the Defendant's pleadings are not in harmony on this point.

Additionally, Plaintiff had no opportunity to respond to this in the Court of Claims. That court based its denial of rehearing upon this point. It is patently unfair to dismiss

a party's lawsuit without allowing him to be heard. What other new points will the government raise on certiorari?

Here the Plaintiff's suit was dismissed. We contend he (Plaintiff) had until the first day of the seventh month following the Secretary's approval or disapproval of the action of the reserve promotion board before the cause of action began to accrue. Since we do not know the date on which the Secretary acted and since it has nowhere been plead or proved, it is impossible to determine when the Statute of Limitations began to run. This point alone requires reversal.

CONCLUSION

In conclusion, William E. Malone asks this Court to consider his plight and reverse the Court of Claims. He bases this on the following factors:

1. The Statute of Limitations should be tolled while the identical case was pending in the Federal District Court in Oklahoma.

2. The filing in the Court of Claims was timely because the documents arrived initially within the statutory period.

3. The denial of rehearing in the Court of Claims was improper because (A) The ultimate issue was raised at a time when Petitioner could not answer it. (B) Since we do not know the specific date of the Secretary of the Army's approval of the June 1967 board and since Petitioner plead he was within the Statutory time, the opinion of the Court of Claims was speculative, improper and outside the scope of its authority.

4. The rejection of the initial papers in this matter was unsound because of frivolous irregularities.

5. Where Petitioner has acted diligently and in good faith and has still been denied his day in court this Court should create a rule allowing him relief.

Petitioner asks that certiorari be granted, the Court of Claims' decision be reversed, the Defendant be directed to file an answer and this matter follow an orderly process to trial.

Respectfully submitted,

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William E. Malone

September, 1974

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 489-73

WILLIAM E. MALONE
v.
THE UNITED STATES

Before SKELTON, Judge, Presiding, NICHOLS and KASHIWA, Judges.

ORDER

This action is before the court on plaintiff's motion for rehearing and defendant's opposition thereto.

Plaintiff alleges that he tendered a petition in this court in mid-November 1973, and that the clerk of this court rejected it for filing on various grounds, among others that the plaintiff's counsel had not been admitted to our bar. He asks us to consider the petition as filed then, not on December 26, 1973, as stated in our previous order. Defendant's opposition, however, correctly points out that plaintiff was actually discharged, with severance pay, on August 18, 1967. With these adjustments made, the suit remains barred by 28 U. S. C. § 2501, because it was not brought within six years of the date when the cause of action accrued.

Accordingly, IT IS ORDERED, that the motion for rehearing is denied.

BY THE COURT

s/ Byron Skelton
Byron Skelton
Judge, Presiding.

JUN 28 1974

[APPENDIX]

IN THE UNITED STATES COURT OF CLAIMS

No. 489-73

WILLIAM E. MALONE

v.

THE UNITED STATES

Before SKELTON, Judge, Presiding, NICHOLS and KASHIWA, Judges.

ORDER

Plaintiff brings this action pursuant to 28 U. S. C. § § 1346 and 1491, seeking monetary damages, as well as other relief, for his alleged illegal separation from active military service in November 1967. Plaintiff's petition was filed on December 26, 1973.

Plaintiff's claim is barred by this court's statute of limitations, 28 U. S. C. § 2501, since he did not file his petition within 6 years of the time his claim first accrued. Plaintiff's failure to file within that period deprives us of jurisdiction. *Kirby* v. *United States*, 201 Ct. Cl. 527 (1973).

IT IS ORDERED that defendant's motion to dismiss is granted. The petition is dismissed.

BY THE COURT

s/ Byron Skelton
Byron Skelton
Judge, Presiding.

MAY 17 1974

CERTIFICATE OF SERVICE

This is to certify that foregoing Petition for Writ of Certiorari has been served this ..... day of September, 1974, by mailing three copies, postage fully paid to each of the following:

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